

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Comprehensive Review of the	)	WC Docket No. 05-195
Universal Service Fund Management,	)	
Administration, and Oversight	)	

**COMMENTS OF BINGHAM MCCUTCHEN LLP**

Bingham McCutchen LLP (“Bingham”), on behalf of its carrier clients, submits its comments in response to the Commission’s September 12, 2008 Notice of Inquiry<sup>1</sup> regarding the management, administration, and oversight of the Universal Service Fund (“USF”).

**I. INTRODUCTION**

The Universal Service Administrative Company (“USAC”), the Administrator of the USF, and the Commission generally do an excellent job in supervising USF management. This is no small task, given the complexity of the various components that make up the USF, which include the contribution and distribution regime, underlying regulations, data collection requirements, dispute resolution functions, and the clarification of issues in cases where existing Commission precedent is unclear or lacks sufficient detail for day-to-day implementation.

However, Bingham’s clients have experienced difficulties with USF oversight and management in three significant areas. These are: (1) transparency of the USF process; (2) resolution of disputes and appeals of USF decisions; and (3) clarification of USF rules and regulations. We address each of these areas herein and provide specific recommendations for the Commission’s

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<sup>1</sup> *Comprehensive Review of the Universal Service Fund Management, Administration and Oversight*, Notice of Inquiry, WC Docket No. 05-195 (rel. Sept. 12, 2008) (“Notice of Inquiry”).

consideration. The three areas overlap and share important characteristics in the often complex interplay between the Commission and USAC, which sometimes extends to the relationship between USAC and the National Exchange Carrier Association (“NECA”) or outside auditors. Many of Bingham’s clients have experienced challenges in their USF interactions with these entities, and common themes encountered by these clients are described herein.

## **II. THE FCC SHOULD INCREASE TRANSPARENCY OF THE USF PROCESS**

The USF process should be transparent. A transparent USF process must be focused on several goals, which include allowing interested parties and the public to have advance notice of the criteria that will be applied to USF management, administration, and oversight; requiring that the USF decision maker base its findings both on established criteria and on evidence that can be reviewed and evaluated by interested parties; and requiring the decision maker to explain its findings in light of the evidence and governing criteria. Although the Commission recognizes the value of transparency by referring to its role in the USF process,<sup>2</sup> our clients’ experiences show that there is reason for concern in this area and that additional measures would be helpful.

For example, the current division of responsibility between the multiple entities involved in USF administration is such that carriers are often left in the middle, asking the Commission and USAC for similar relief or having two parties, *e.g.*, USAC and NECA, providing conflicting information or refusing to take accountability in order to fix the problem. Furthermore, outside auditors often must seek guidance from USAC in order to resolve disputes and USAC must occasionally seek guidance from the Commission to answer difficult questions. These discus-

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<sup>2</sup> See Notice of Inquiry, ¶ 32 (“Should the Commission establish any requirements specifically designed to create greater transparency in the relationship between NECA and the USF Administrator?”); ¶ 33 (“We also seek comment on other ways to ensure fairness and transparency in the USF Administrator beyond those provided for in the [Federal Acquisition Regulation] FAR”).

sions often take place away from public view and are conducted in a manner that results in carriers not having access to the ultimate decision maker. Instead of excluding carriers from this process, a truly transparent regime would make clear which entity is responsible for a particular problem, the criteria considered and applied to resolve the problem, the guidance issued to resolve the problem, and the specific process that will be followed (including a required time-frame for resolution) if a carrier is not satisfied or disagrees with the answer.

The problem is exacerbated when the USAC internal policies being applied to specific carrier situations are not publicized, and are known only by USAC and the affected carrier. Bingham therefore recommends that all internal USAC guidelines and policies (without revealing company-specific confidential information) should be made available publicly. This information includes the following categories of information: summaries of audit findings to give companies guidance on common mistakes and USAC resolution of such issues; summaries of issues referred to the FCC for guidance, whether through the audit or other internal processes; and USAC internal procedures, such as administrative deadlines for processing forms.<sup>3</sup>

### **III. USF DISPUTE RESOLUTION PROCEDURES SHOULD BE IMPROVED**

The Commission notes that earlier this year, it required the USF Administrator to establish customer service standards, including measures applicable to the resolution of complaints, and to report regularly on the quality of service provided to USF stakeholders.<sup>4</sup> While the

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<sup>3</sup> USAC is not authorized to make substantive policy. *See* 47 CFR §54.702(c). In some cases, however, applying USAC's internal guidelines results in a substantive ruling that is arguably a policy change. Making USAC's internal guidelines public not only will give notice of administrative deadlines and procedures that could have a substantive impact on a carrier's USF obligations, it will also give interested parties the opportunity to object if particular guidelines should be subject to the notice and comment provisions of the Administrative Procedure Act, 5 U.S.C. § 551, *et seq.*

<sup>4</sup> Notice of Inquiry, ¶ 24. The Commission earlier established performance goals and measures for the USF and the USF administrator. *Id.*, ¶ 24, *citing Comprehensive Review of the Universal Service Fund*,

Commission's initiative in this area is an encouraging development, Bingham clients have experienced multiple difficulties in obtaining resolution of their USF disputes.

Carriers have a variety of disputes with USAC relating to contribution amounts, payment, and USF determinations regarding these issues. Unfortunately, USAC appears to be relatively helpless in offering any meaningful resolution to the issues that carriers (or their beneficiaries) bring before them. This inability to resolve issues extends to ministerial aspects of USF administration, including the frequent situation in which an appeal requests a modest waiver of a Commission rule for a non-substantive issue such as a filing date. USAC is unable to offer such routine waivers. The Commission often grants such waivers, but frequently does so only after years of delay. This uncertainty and delay is counterproductive to the efficient management of the USF and is, in turn, vastly disruptive to carriers who must rely on USF administration for the operation of their businesses.

On a related matter, sometimes seemingly minor changes in USAC internal policies can create significant changes in a carrier's USF obligations. For example, USAC recently reversed its existing practice and denied a carrier's expected increase in local switching support based on a supposedly uniform "policy" that a decrease in a carrier's loop count should not result in increased local switching support. After the carrier objected that the rule did not apply to it and appealed the USAC determination, USAC compounded the problem by extending its unilateral interpretation of the rule to recoup local switching support that had been provided in prior years.<sup>5</sup>

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*Management, Administration and Oversight*, WC Docket No. 05-195, Report and Order, 22 FCC Rcd 16372 (2007).

<sup>5</sup> The carrier filed a Request for Review, which is pending before the Commission. See *Request for Review by Mid-Communications, Inc. dba HickoryTech of Decision by Universal Service Administrator*, CC Docket Nos. 96-45 & 97-21 (filed June 16, 2008).

Similarly, a carrier may inadvertently deviate from unknown USAC standard operating procedures with disastrous results. For example, under USAC's unpublished processing guidelines, a carrier that files its revised 499A within the one-year window established by the Commission, but after the close of the second quarter, is forced to true-up its prior year USF contribution obligations twice, once based on the original 499A in the third quarter, and a second time based on the revised 499A in the fourth quarter. As previously noted, USAC's procedures should be made explicit and publicly available so that carriers are fully aware of the rules that will be applied to important economic issues that impact their business operations.

A recurring theme in Bingham's carrier clients' experiences with USAC, NECA, the Commission, and outside auditors is a widespread lack of communication and coordination between these entities. For example, in some circumstances Commission staff (typically wire-line competition bureau staff), direct companies to contact USAC first and USAC responds that it has no authority to address the issue. In rare instances, USAC and the Commission staff have both advised a carrier to contact the other entity. This conflicting direction does not advance efficiency and cost-effective operation of the USF.

The Commission can also make compliance with the existing regulations and the Form 499-A instructions difficult, especially when substantive changes to the Form occur after the year for which revenue is being reported has already passed. For instance, with the 2007 Form 499-A, reporting 2006 revenue, the Form 499-A instructions for reporting carrier's carrier revenue included a new and detailed certification that the Commission expected wholesalers to receive from their resellers. As the year of revenue had already passed, carriers were not certain how they should handle revenue that may have changed from carrier's carrier to end user (or vice-versa) as a result of this substantive change.

This constant, often unseen interplay between the Commission and USAC can be frustrating for carriers. Such frustration is caused by the position that USAC, as administrator, has within the system. One potential solution would be to give USAC more authority to make routine decisions and grant waivers (within explicit, publicly known parameters) so that the Commission is not burdened with relatively ordinary administrative matters such as requests for the extension of procedural deadlines. The Commission would only become involved in more substantive or unique issues that require a policy-making or adjudicatory function. As explained herein, such Commission involvement should be transparent and the issues raised and resolution of such issues should be publicly available.

Alternatively, USAC's role could be further restricted to an Administrator that processes forms, sends invoices and disbursements and offers no expertise at all. In this case, carriers and recipients would be required to contact the Commission with each and every controversy or inquiry, even the most mundane, such as billing errors. This would require the Commission to increase its ability to respond quickly and efficiently to the numerous questions that arise in the day-to-day administration and management of the fund. This approach would have the advantage of providing a single point of contact and promoting accountability for timely and efficient resolution of issues raised by carriers. It would, however, embroil Commission staff in the day-to-day operations of the USF and waste the considerable expertise that USAC personnel have established over many years administering the USF.

#### **IV. THE FCC AND USAC SHOULD PROVIDE PUBLIC GUIDANCE ON PRACTICAL APPLICATION OF EXISTING USF RULES**

The Commission asks for comment on the "efficiency and effectiveness of the process for obtaining timely guidance with interpretation of our rules, especially with regard to the

administration of the USF programs.”<sup>6</sup> Within the regulatory framework that comprises the USF, carriers often ask specific questions on how to account for and report revenue and other required line items, such as working loops. USAC has several knowledgeable experts who can provide carriers with specific advice and suggestions. Unfortunately, it is not clear to what extent the Commission oversees this advice.

Similarly, while Commission staff are generally well-versed in the underlying USF regulations, they are often not familiar with the practical applications of implementing these regulations in USAC reporting and compliance. As a result, when a carrier disagrees with USAC’s implementation or interpretation of a rule, the carrier is often required to provide detailed explanation to the Commission staff on the practical implications of the rules. This can be a time-consuming and expensive process that does not promote the efficiency of USF administration.

We understand that the Commission cannot adopt detailed rules that address each and every situation a carrier or USAC may face in implementing the USF. Apart from the extraordinary step of filing a petition for declaratory ruling, however, today there is no process to clarify existing rules for purposes of implementation. As a result, USAC staff and auditors either make their “best guess” as to what the rule means when applied to a particular situation or USAC refers questions to Commission staff. These referrals may not be answered by Commission staff for some period of time, and it is not clear that the requesting party receives notice of the Commission staff recommendation in every instance. Such informal and often hidden decision-

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<sup>6</sup> Notice of Inquiry, ¶ 30.

making is an anathema to good policy making. For instance, but for Intercall's decision to appeal and seek a declaratory ruling reversing USAC's classification of its audio bridging service, USAC's declaration that the service was a telecommunications service subject to historical USF contribution requirements would have been applied to Intercall alone, without the opportunity for similarly situated carriers to (1) understand the risks of a USAC audit of their business or (2) comment on this issue of first impression decided by USAC (not the Commission). On appeal, while the Commission agreed that the service contained telecommunications, it acknowledged that the ruling was a departure from or expansion of prior precedent and limited the effect of the ruling to prospective application only.<sup>7</sup> If Intercall had not had the resources to pursue the appeal, USAC's decision would have stood, Intercall would have been at a competitive disadvantage vis-à-vis its competitors, and if and when its competitors were audited, the fact that USAC had made this determination in a prior case likely would have weighed against reversal by the Commission.

Absent an appeal to the FCC, there is no mechanism to provide all interested parties notice of this guidance. In Bingham's experience, there may be a number of reasons that a particular carrier does not appeal an adverse audit determination or USAC rule interpretation. Those reasons could include, for example, lack of resources, an insubstantial impact on the carrier's overall business plan or USF obligations, or the uncertainty of an undefined and protracted appeal process. For example, if a USAC auditor classifies all private lines as interstate absent a customer certification of *de minimis* interstate usage, but private line service is only a fraction of a carrier's telecommunications revenue, the carrier may decide not to pursue an

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<sup>7</sup> See *Request for Review by InterCall, Inc., of Decision of Universal Service Administrator*, CC Docket No. 96-45 (rel. June 30, 2008), ¶ 24.



appeal. Without an appeal, this audit finding is not summarized (with confidential information redacted) and made available to the public. Even if carrier appeals a USAC determination to the Commission, because such decisions often take months or years to issue (if one is ever provided), seeking such formal determinations is not a reliable means of providing USF contributors or recipients with the clarification they need in a timely fashion. These serious shortcomings in the current process could be fixed by requiring USAC to publish, in summary format and with confidential information redacted, the substantive determinations USAC issues via the audit or internal appeal process.

## **V. RECOMMENDATIONS**

The specific recommendations that Bingham has made in these comments can be summarized as follows:

- Increase transparency regarding the division of responsibility for USF issues between the various USF entities (such as USAC and auditors, USAC and NECA) by specifying which entity is responsible for particular problems; the criteria considered and applied to resolve the problem; the guidance issued to resolve the problem; and the specific process that will be followed (including a required timeframe for resolution) if a carrier is not satisfied or disagrees with the answer.
- Increase transparency into the USAC decision making process by requiring that all internal USAC guidelines, policies and determinations be publicized (without revealing company-specific confidential information), including the following categories of information: summaries of audit findings and USAC determinations that may be appealed to the FCC to give companies guidance on USAC resolution of such issues; summaries of issues referred to the FCC for guidance; and USAC internal procedures, such as administrative deadlines for processing forms.
- Address the lack of communication and coordination between USAC, NECA, the Commission and outside auditors by clarifying the role of each entity with regard to dispute resolution and issuing clarifications of existing rules or processes.

- Implement a mechanism to clarify existing USF reporting and compliance rules for purposes of implementation so that carriers, USAC staff and auditors all have access to the same information, thereby minimizing the risk of competitive disadvantages that might result from unpublicized and/or inconsistent findings.

## VI. CONCLUSION

For the foregoing reasons, Bingham requests that the Commission adopt the recommendations made herein.

Respectfully submitted,



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